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No. 07-506

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In The

Supreme Court of the United States

JAMES R. GIBSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. With respect to Question 1 presented in the Petition: Whether Petitioner was ever advised, pursuant to Rule 11, of the consequences of persisting in his guilty plea and whether he ever requested to withdraw the plea.

2. With respect to Question 2 presented in the Petition: Whether Petitioner preserved the double jeopardy issue in the courts below and whether trial on dismissed charges violated double jeopardy.

3. With respect to Question 3 presented in the Petition: Whether the government is required to fulfill its promises in the plea agreement when Petitioner has never sought to withdraw the plea.

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INTRODUCTION

Respondent's Brief in Opposition rests on several erroneous statements of fact and law. The result is a series of straw man arguments that fail to address the important questions presented to this Court in the Petition. Attempting to distinguish cases that create a conflict in the Circuits or which otherwise support Petitioner's position, Respondent fails to make the most important distinctions, treating pleas and plea agreements as if they were the same thing and treating unauthorized arguments of appellate counsel as if they were the express statements of Petitioner. Indeed, Respondent's failure to make the proper distinctions magnifies the need for this Court to provide clarity by granting the Petition.

ARGUMENT

1. AT NO TIME WAS PETITIONER ADVISED OF THE CONSEQUENCES OF PERSISTING IN HIS GUILTY PLEA NOR DID HE REQUEST ANY COURT TO WITHDRAW THE PLEA.

Respondent asserts Petitioner asked the Court of Appeals in *Gibson I* to hold both the plea and the plea agreement void. Br. 4. Later, Respondent asserts Petitioner did make a specific request to vacate the plea in the Court of Appeals and that Petitioner erroneously states the Court sua sponte vacated the plea. *Id.* 6-7. It is on these assertions that Respondent

rests the conclusion that cases cited by Petitioner as showing a conflict among the Circuits are irrelevant.

Respondent's argument fails because it is not a specific request made allegedly on behalf of a defendant that the Rule requires, but a request made *specifically by the defendant* before a plea may be vacated. Both the old version and the new version of Rule 11 require the Court in open court to "*advise the defendant personally*" of the right to withdraw the plea and advise him or her the outcome may be less favorable if the defendant persists in the plea of guilty.

Thus, cases cited by Petitioner, including *United States v. Lopez*, 385 F.3d 245, 251-252 n.13 (2d Cir. 2004); *United States v. Patterson*, 381 F.3d 859, 865 (9th Cir. 2004); *In re Ellis*, 356 F.3d 1198, 1208 (9th Cir. 2004) (en banc), are relevant and establish a conflict. These cases uphold the principle that in the absence of a request specifically by the defendant, a court is without authority to vacate a validly entered guilty plea. Nowhere does Respondent's brief point to any authority that allows a court to vacate a plea without the *personal* involvement of the defendant. There simply is no such authority.

Related to the error concerning who must make the request to vacate a plea is the reliance by Respondent on errors below that merge pleas and plea agreements into one conceptual entity. They are not the same thing, nor are they even transactions between the same parties. A plea agreement is a

negotiated contract between the defendant and the government, while a plea is a transaction between the defendant and the Court. *Patterson*, *Lopez*, and *Ellis* all establish that a Court may reject a plea agreement while leaving the plea itself intact. As pointed out in the Petition, the plea agreement gave *Petitioner* the option of withdrawing the plea if the Court rejected the agreement and the District Court informed Petitioner precisely of that fact during the plea colloquy. Pet. 5-7; Pet. App. 30-31, 41.

No court has ever advised Petitioner personally of the right to withdraw his plea, afforded him the opportunity to do so, and advised him of the consequences of persisting in the plea. What is evident from the record is that had he been properly advised, he would have persisted in the plea. At the Status Conference before the sentence on the plea, Petitioner sought new counsel and informed the District Court of the five-year maximum sentence. Pet. App. 24-28. Instead of advising Petitioner of his rights, the Court merely responded that he had one of the "premier lawyers in the Midwest" and Petitioner should heed his advice. *Id.* 27-28.

Thus, the Seventh Circuit's conclusion that it could not preserve the plea yet discard the sentence in *United States v. Gibson*, 356 F.3d 761 (7th Cir. 2004) (*"Gibson I"*), Br. 4, Pet. App. 17, is directly counter to the law. If the District Court had discovered the error, its only option would have been to afford Petitioner the opportunity to withdraw the plea and proceed to sentencing *within the law* if

Petitioner had persisted. When the Court of Appeals discovered the error, its only option was to remand to the District Court so the Court could personally advise Petitioner. That is the lesson learned from *Patterson*, *Ellis*, and *Lopez*. This Court must resolve the conflict created by this case.

2. PETITIONER DID NOT WAIVE THE DOUBLE JEOPARDY ARGUMENT, HAVING REPEATEDLY RAISED IT IN THE COURTS BELOW.

Respondent asserts that Petitioner first raised the double jeopardy issue on appeal in the Supplemental Brief and therefore has waived it. This assertion is patently false. On remand after *Gibson I*, Petitioner, proceeding *pro se*, raised the issue in a motion for dismissal on August 31, 2004, which the District Court denied on October 27, 2004.[1] D.Ct. Dkt. 353, 360. A February 24, 2005, motion to reconsider was orally denied on March 14, 2005, with a written order filed on March 21, 2005. D.Ct. Dkt. 394, 415, 418. Petitioner filed an interlocutory appeal, which was dismissed on April 1, 2005. *See* Pet. 7-8.

Following his trial and sentence after remand, Petitioner appealed and immediately filed a motion in the Court of Appeals seeking to challenge the conviction on double jeopardy grounds. The motion was

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[1] The August 31, 2004, filing date was incorrectly given as the date of the denial in the Petition.

denied on the ground that Petitioner was represented by counsel who "shall make all filings on his behalf." This was in error as Petitioner had proceeded *pro se* and had been represented only by stand-by counsel in the District Court. Stand-by counsel was subsequently appointed for the appeal on January 30, 2006. The Brief was not filed until over ten months later, on November 6, 2006, following five motions to extend time by appointed counsel. Petitioner filed a *pro se* motion for appointment of new counsel on November 13, 2006, so the issues could be raised. That motion was denied on November 30, 2006. A motion to stay oral argument and permit substitution of counsel so the double jeopardy and other issues presented here by Petitioner could be raised was denied, as was the motion to reconsider. The Court of Appeals did not permit substitution of counsel and supplemental briefing until after oral argument and denied oral argument on the new issues.

Thus, Petitioner raised the issue in the District Court and has consistently attempted to keep it before the Courts. Respondent appears to argue that it was because the issue had not been properly raised that the Seventh Circuit "declined to address the claim." Considering that the Circuit addressed other claims raised in the Supplemental Brief, it would be at best guesswork to determine why it did not specifically address the double jeopardy issue, but if the Court had believed the issue to be waived, it would almost certainly have said so. In any event, the Court implicitly ruled that double jeopardy had not been

violated by its refusal to address the issue. Despite Respondent's claim that this case would be a "highly inappropriate vehicle for this Court" to address the conflict, Br. 11, the procedural history of the case makes it a highly *appropriate* case for this Court.

Respondent's tautological argument that double jeopardy does not preclude trial when a defendant has successfully succeeded in having a plea set aside, Br. 11-12, is again irrelevant because, as argued in the Petition and *supra*, Petitioner never sought to have the plea set aside and he was the only one with authority of law to seek to have it nullified.

Finally, citing *Ohio v. Johnson*, 467 U.S. 493 (1984), Respondent asserts jeopardy did not attach to dismissed counts because Petitioner did not plead guilty to those counts nor was he otherwise exposed to conviction. Br. 12. Respondent does not respond to the analysis of *Johnson* by Petitioner and to the discussion of cases involving estoppel of prosecution on dismissed counts after a plea. Pet. 19-22.

Respondent then cites several cases in support of its argument that no double jeopardy bar existed with respect to dismissed counts in this case. The cases cited are *United States v. Green*, 139 F.3d 1002 (4th Cir. 1998); *United States v. Barker*, 681 F.2d 589 (9th Cir. 1982); *Klobuchir v. Pennsylvania*, 639 F.2d 966 (3d Cir.), cert. denied, 454 U.S. 1031 (1981); *Hawk v. Berkemer*, 610 F.2d 445 (6th Cir. 1979). Respondent's purported authority misses the mark. In each of these cases, the defendant successfully sought, either on

appeal or in post-conviction proceedings, to have the conviction set aside. In none of the cases did the defendant contest the vacating of the original convictions. The cases cited by Respondent support nothing more than its earlier tautology that double jeopardy does not bar prosecution when a defendant successfully has a conviction vacated.

Because in this case a valid conviction by plea was improperly set aside and should be reinstated, the Double Jeopardy Clause is implicated and bars conviction on counts dismissed as a result of the plea. Pet. 16-22.

3. PETITIONER IS ENTITLED TO ENFORCEMENT OF THE GOVERNMENT'S PROMISES IN THE PLEA AGREEMENT BECAUSE HE NEVER SOUGHT TO WITHDRAW THE PLEA.

Respondent's arguments with respect to whether Petitioner was entitled to enforcement of the government's promises in the plea agreement also rely on the failure to distinguish properly between a plea and a plea agreement and on the false assertion that Petitioner sought to withdraw his plea. Respondent does not address the fundamental issue of enforcing what remains of a plea agreement after removal of unlawful provisions that result from a mutual mistake of law. *See* Pet. 22-29.

The cases relied on by Respondent are not relevant to the issues presented here. In *United States v.*

Greatwalker, 285 F.3d 727 (8th Cir. 2002), the defendant successfully appealed the denial of his motion to withdraw his plea. He argued on appeal that the 35-year sentence for first degree murder was illegal because the statute required a life sentence. The most noteworthy factor involved in *Greatwalker* was that it was the defendant who sought to withdraw the plea, both in the District Court and on appeal. Because the Court of Appeals vacated the plea based on the illegal sentence, any statements about other terms of the plea bargain are dicta, because the condition precedent required to trigger the government's obligations, i.e., a guilty plea, was effectively not performed.

Similarly, *United States v. Peterson*, 268 F.3d 533 (7th Cir. 2001) has little bearing on the issues here, and to the extent it is instructive, the case supports Petitioner's position. The defendant in *Peterson* sought relief from an order of restitution to victims of relevant conduct. The Court found the defendant had specifically agreed to the restitution in the plea agreement and, on that ground, affirmed the sentence. Similarly, the Appeals Court in *United States v. Bernard*, 373 F.3d 339 (3rd Cir. 2004), also cited by Respondent, affirmed after defendant agreed in the plea agreement to application of enhancements that would normally not apply under the United States Sentencing Guidelines. The defendant in that case was sentenced within the statutory limits.

A careful reading of *United States v. Mukai*, 26 F.3d 953 (9th Cir. 1994), also supports Petitioner's position. There, too, a Rule 11(e)(1)(C) agreement was

involved, in which the parties agreed that a sentence of not less than five years nor more than seven was the appropriate disposition. *Id.* at 954. The government appealed when the District Court denied its motion to withdraw from the plea agreement following the District Court's sentence of a term of probation. Respondent ignores the most salient fact of this case, which was the plea agreement specifically stated the government "shall be afforded an opportunity to withdraw from this plea agreement" if the sentence was less than five years imprisonment. *Id.* In the case before the Court, no such provision was in the plea agreement.

Thus, the cases cited by Respondent do not address the issue of enforcement of a plea agreement with the exception of illegal components. Nor do Respondent's arguments address the policy arguments and cases cited by Petitioner, Pet. 23-26, concerning enforcement of remaining elements of a plea agreement when an illegal sentence is agreed upon by the parties.

After relying on cases that are either irrelevant or supportive of Petitioner's position, Respondent then tries to distinguish *United States v. Transfiguracion*, 442 F.3d 1222 (9th Cir. 2006), and *United States v. Barron*, 172 F.3d 1153 (9th Cir. 1999). Br. 9-10. *Transfiguracion* and *Barron* (and the cases cited therein) are not materially distinguishable and support the position that a mutual mistake of law does not invalidate remaining elements of the plea agreement.

Respondent correctly states, Br. 9, that the *Transfiguracion* Court held that with liberty interests at stake, it could not allow the government to rescind the plea agreement. The Court also stated that the government could have, but did not, include in the plea agreement a provision that it could reinstate dismissed charges in the event the informations to which the defendants pled were dismissed for any reason. *Transfiguracion*, 442 F.3d at 1233. Similarly, the government here could have included terms that would permit it to reinstate counts if the sentence imposed was less than what was agreed upon or if a Court of Appeals erroneously vacated the guilty plea. It did not do so. *Cf. Mukai*, 26 F.3d 954.

The *Transfiguracion* Court also stated "The defendants' actions [in seeking dismissal] were not barred by the agreements' literal terms, so the agreements remain in force." 442 F. 3d at 1232. The agreement in this case goes much further. It not only fails to bar Petitioner's action in seeking to invalidate the illegal sentence in *Gibson I*, the plea agreement expressly permits him to appeal an illegal sentence. Pet. App. 43. In Paragraph 11 of Part II of the Agreement, the right to appeal a sentence is acknowledged with the provision that the right is waived *only* to the extent that the sentence is within the statutory maximum. As in *Transfiguracion*, Petitioner here pled guilty and did all else that was required of him by the agreement. The government can be held to no less.

Respondent implies that the *Transfiguracion* Court reached its decision based on a concern that the government could use the defendants' cooperation against them if it were released from its promise to dismiss counts. Br. at 9. While the Court did express that concern, it did so only in the context of what it would do "Even if considerations of fairness to the government were pertinent–which they are not, as the terms of the agreements favor the defendants' position. . . ." Thus, the Court would have reached the same decision whether defendants had cooperated or not. The fact that they cooperated does not distinguish *Transfiguracion* from this case in any meaningful way. The reasoning there is applicable with at least equal force here.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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